84-680

No. .....

In The

Supreme Court of the United States

October Term, 1984

CAMEO CONVALESCENT CENTER, INC.,
a Wisconsin corporation,

Cross-Petitioner,

vs.

DARLA C. SENN, et al.,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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50 pp

QUESTIONS PRESENTED

1. What are the proper standards applicable in determining whether a misuse or abuse of legal process, undertaken under color of state law, constitutes a violation of the Fourteenth Amendment Due Process Clause?

2. Did the Seventh Circuit Court of Appeals violate the cross-petitioner's Seventh Amendment right to a jury trial when it vacated the jury verdict in favor of the cross-petitioner and substituted its judgment for that of the jury on a question of fact?

PARTIES TO THE PROCEEDINGS BELOW

Cross-Petitioner, Cameo Convalescent Center, Inc., and in addition, the plaintiffs Dragomir Kresovic, Borislav Kresovic and Linda Hintz.

Cross-Respondent, Darla C. Senn, and in addition, the defendants, Donald E. Percy, Robert Durkin, Charles J. Fiss, Jr., Peggy Ann Smelser, Louis E. Remily, David L. Siegel, Thomas G. Van de Grift, Milton J. Stearns, Fran Richards, Kathleen Rubin, Nancy Kacynski, and Janet Zanck.

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CROSS-PETITION FOR WRIT OF CERTIORARI

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Cross-Petitioner, Cameo Convalescent Center, Inc.[1] of Wisconsin, respectfully prays that a writ of certiorari

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[1] Pursuant to Rule 28.1, Cameo asserts that it has no parent company, subsidiaries or affiliates.

issue to review that portion of the orders of the United States Court of Appeals for the Seventh Circuit, entered on June 29 and July 30, 1984, which vacated the judgment of the United States District Court for the Western District of Wisconsin in favor of the cross-petitioner and against the cross-respondent, Darla C. Senn.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals is published at 738 F.2d 836 (7th Cir. 1984). The decision of the district court is not published but is contained in the cross-petitioner's appendix, pp. 1A-4A.

JURISDICTION

The order of the Court of Appeals for the Seventh Circuit was originally entered on June 29, 1984. That court subsequently denied the cross-petitioner's motion for rehearing but amended its decision by order entered on July 30, 1984. A petition for certiorari was filed with this Court by the cross-respondents within 90 days of the entry of the order denying rehearing. That petition for certiorari was received by the cross-petitioner on September 27, 1984. This Court's jurisdiction is invoked under 28 U. S. C. §1254(1) and Supreme Court Rule 19.5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment to the United States Constitution, Article VII.

> "[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment to the United States Constitution, Article XIV, Section 1:

> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . . "

United States Code, Title 42: §1983 Civil Action for Deprivation of Rights:

> "Every person who, under color of any statute, ordinance, regulation, . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The operative state statutes are quoted in the petition for certiorari filed by the cross-respondents.

STATEMENT OF CASE

This is an action for legal and equitable relief under the First, Ninth, and Fourteenth Amendments to the United States Constitution, and the Civil Rights Act of 1871, 42 U.S.C. §1983 (R. 70, Second Amended Complaint). Cross-petitioner contended that it was denied its Fourteenth Amendment rights by Darla Senn, both individually and through an ongoing conspiracy of the remaining defendants. Darla Senn and the other defendants are alleged to have done this by abusing the regulatory process

of the Department of Health and Social Services. Additional facts are contained in the brief in opposition to the petition for certiorari.

Specifically, Cameo contends that it was cited for numerous violations of Wisconsin's nursing home regulations without any reasonable basis in fact or law. The pursuit of these alleged violations through the hearing process and other enforcement actions continued despite the defendants' knowledge that there was no reasonable basis for them and ultimately led to other sanctions, including placing Cameo on a suspension of referrals (SOR) list.

Cameo is a family-owned corporation whose primary business is operating a licensed nursing home. (R. 219, Tr. Vol. I, p. 3)

The Wisconsin Department of Health and Social Services is the agency of the State of Wisconsin which is responsible for the inspection and licensing of nursing homes in the State of Wisconsin. (R. 219, Tr. Vol. I, p. 14) Surveys of nursing homes in the State of Wisconsin were conducted annually by surveyors employed by the Department of Health and Social Services. (R. 219, Tr. Vol. I, pp. 14-15) All initial defendants, including Darla Senn, were officers or employees of the Department of Health and Social Services. (R. 70, Second Amended Complaint, pp. 5-7; R. 77, Answer to Second Amended Complaint) Darla Senn was a nurse-surveyor for the Department of Health and Social Services. (Tr. 215, Tr. Vol. IV, pp. 118 & 219)

The initial event giving rise to plaintiff's claim occurred on September 19, 1978, when Cameo was served

with 34 Notices of Violation ("NOV's"). (R. 219, Tr. Vol. I, p. 45; Ex. 22; Ex. 23) Thirty-one of those NOV's were served on the home by Senn. Cameo introduced evidence that shortly after serving the NOV's on Cameo, Senn commented to another state surveyor, "You know, I intend to screw them [Cameo]." (Ex. 327)

A timely appeal of those NOV's was filed by Cameo on September 29, 1978. (R. 219, Tr. Vol. I, p. 49; Ex. 36) Despite Cameo's timely appeal, no hearing was scheduled by the Department within the 30 days required by Wis. Stat. §50.04(e). (R. 219, Tr. Vol. I, pp. 54, 64-65; Ex. 54) There was substantial evidence in the record from which the jury could infer that all, or a substantial portion, of the delay was attributable to Senn's failure to cooperate with other agency personnel in providing information requested, not only by Cameo, but also by agency personnel responsible for moving forward to hearing. (Resp. App., p. 1A)

On March 21, 1979, Cameo received notice that it was being placed on the "suspension of referrals" list for April of 1979. (Resp. App. pp. 10A-12A) Wis. Stat. §50.04(4)(d) prohibits placement on that list until any requested hearings have been completed. Notwithstanding Cameo's timely request for a hearing, Cameo was placed on the suspension of referrals list in April of 1979, and that list was mailed to over 600 recipients, without Cameo being afforded an opportunity for a hearing. (R. 219, Tr. Vol. I, pp. 62-63; Ex. 111; Ex. 121; R. 214, Tr. Vol. IV, pp. 102, 110, 112-113)

The record is replete with evidence of the lack of merit to the NOV's themselves. (Cross-Pet. App. 7A-13A;

Resp. App. pp. 1A-9A) Ultimately these NOV's were disposed of by stipulation (Ex. 256).

A bifurcated trial was held to a jury on the issues of liability and damages. Prior to submission of the cause to the jury, the district court instructed the jury that cross-petitioner's claims were based upon the Fourteenth Amendment and that the cross-petitioner sought damages for deprivations of its "property." The court also gave the jury general instructions to the effect that the Fourteenth Amendment and 42 U.S.C. §1983 were designed to protect against certain "deprivations" of legally protected interests. (Cross-Pet. App. 13A-14A)

The jury found that Defendant Senn had engaged in unconstitutional malicious prosecution by initiating and maintaining NOV's against Cameo without probable cause, and that she had engaged in unconstitutional abuse of legal process because she had done so with an improper or ulterior motive. The jury found that Cameo had suffered ordinary damages of $65,000 as a proximate result of these actions, and imposed punitive damages in the amount of $10,000 due to the defendant's malice.

On December 8, 1982, pursuant to Federal Rules of Civil Procedure 50(b) and 59(e), the court dismissed the post-trial motions filed by Darla Senn for judgment notwithstanding the verdict and to amend the judgment to one of no liability. (Cross-Pet. App. 1A-4A) On December 28, 1982, Senn filed a notice of appeal from the court's December 8, 1982 decision on the merits. On January 5, 1983, Cameo also filed a timely notice of appeal with respect to the dismissal of the remaining defendants.

On appeal to the Seventh Circuit Court of Appeals, Senn did not deny that her acts of malicious prosecution

and abuse of process had occurred. She instead argued that she should be absolutely immune from liability for her acts under prosecutorial immunity[2] and that her acts are not actionable under 42 U.S.C. §1983 because they did not constitute a deprivation of constitutional magnitude. The court of appeals set aside the jury verdict against Senn, finding, apparently on its own independent review of the record, that "Senn's issuance of the NOV's is simply too attenuated to permit this court to hold that Senn subjected or caused Cameo to be subjected, to the deprivation of due process." (Pet. App. at p. 46)

REASON FOR GRANTING THE CROSS-PETITION

The factors which this Court should consider in determining whether to grant a petition or cross-petition for certiorari are contained in Supreme Court Rule 17. That section provides that certiorari is appropriate where the petition seeks to review a decision of a federal court of appeals which is in conflict with the decision of other courts of appeals on the same matter or where a court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In addition, a writ of certiorari would also be appropriate where a federal court of appeals has decided an important question of federal law which has not previously been, but should

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[2] Senn, in fact, never raised the defense of prosecutorial immunity in her answer to the complaint. Only two of the defendants, lawyers Siegel and Van de Grift, had interposed that defense. (Cross-Pet. App. 4A) Nevertheless, the district judge submitted Senn's immunity defense to the jury, over the objections of cross-petitioners, and the jury found no immunity. (Pet. App. pp. 58 and 61)

be, finally settled by the Supreme Court, or has decided a federal question in a way which is in conflict with the applicable decisions of this Court.

We believe that this cross-petition for certiorari should be granted, under those standards, for two reasons. First of all, the decision of the circuit court was in conflict with the decisions of other circuit courts on the same issue and that issue is an important issue of federal law which has never been decided by this Court. Second, we believe that the circuit court, in substituting its judgment for that of the jury, has so far departed from the usual and accepted course of judicial proceedings, and brought itself into conflict with the decisions of this Court, so as to call for an exercise of this Court's power of supervision.

I. THE STANDARDS TO BE APPLIED IN DETERMINING WHEN THE ABUSE OR MISUSE OF LEGAL PROCESS ALSO CONSTITUTES A VIOLATION OF DUE PROCESS IS AN IMPORTANT FEDERAL QUESTION REQUIRING DECISION BY THIS COURT.

It is perhaps ironic that, while this Court has painstakenly deliniated the requirements which must be met in order for certain public officials to qualify for absolute immunity from liability under 42 U.S.C. §1983 for any abuse or misuse of legal process, see *Dennis v. Sparks*, 449 U.S. 24 (1980), *Butz v. Economou*, 438 U.S. 478 (1978), and *Imbler v. Pachtman*, 424 U.S. 409 (1976), it has never addressed the underlying, and more fundamental, question of what factors will bring the victim of a misuse or abuse of legal process within the protection of the due process clause.

This Court has noted that the deterrence of future abuses of power, by persons acting under color of state

law, was an important purpose in the adoption of §1983, *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981). Where a public official, under color of state law, abuses or misuses the state's legal machinery in order to obtain some impermissible purpose, that conduct would clearly seem to be an abuse of power, and hence the type of evil which §1983 was enacted to prevent. Thus, our analysis must recognize that, at least in some circumstances, abuse or misuse of legal process is constitutionally proscribed. The circumstances under which the Constitution is offended by that conduct, however, is more elusive.

This Court has addressed the question of when an act of defamation may rise to the level of a due process deprivation in *Paul v. Davis,* 424 U.S. 693 (1976) and *Wisconsin v. Constantineau,* 400 U.S. 433 (1971). Lower courts have generally tried to apply the principles of these cases to abuse or misuse of process claims, but without any degree of consistency. The differing nature of the two types of torts does not usually lead to a meaningful comparison.

The two major differences lie in the nature of the wrong committed and in the nature of the interests at stake and ultimately deprived. In *Paul v. Davis,* and its genre, the wrong committed was the failure to provide a meaningful hearing when there is a threat to a protected interest. The interest which was threatened and the interest which was ultimately deprived are the same. In an abuse of process or malicious prosecution claim, the wrong committed is the compelling of a person to go through a meaningless hearing, under threat of loss of a protected interest. In such a case, the interest which is ultimately taken is probably not the same interest which was at stake in the proceeding.

For example, in those cases where a protected interest has been deprived through defamation, the obvious remedy to such intentional or erroneous deprivation is to require some form of a hearing before the deprivation occurs. See, for example, *Mathews v. Eldridge,* 424 U.S. 319 (1976). It is the denial of a meaningful opportunity to be heard which forms the basis of liability in this type of case.

In an abuse or misuse of process case, on the other hand, the injured party has not been denied a hearing. His complaint is that, without probable cause and for no good reason, the hearing process, and its accompanying costs and losses, have been thrust upon him. In other words, in an abuse or misuse of process case, a due process hearing would not serve as a check *against* the infliction of injury. The hearing, instead, serves as the mechanism *for* the infliction of injury.

The fact that public officials readily recognize that litigation can be used to "punish" disfavored parties is demonstrated by the record in this case. (Cross-Pet. App. 5A-7A) An Assistant Attorney General, who was assigned to seek enforcement of three subpoenas objected to by Cameo, acknowledged that the subpoena enforcement action had been initiated, in lieu of simply reissuing the subpoenas in unobjectionable form, to "penalize" Cameo for "lack of cooperation in other respects." See also the recogniton by Defendant Van de Grift, of the State's superior economic ability to pursue the litigation and his willingness to use that superior ability, in a June 13, 1979 memo. (Cross-Pet. App. 6A-7A)

Similarly, one of the necessary elements of malicious prosecution is that the litigation has been terminated fa-

vorably to the plaintiff. *Morrison v. Jones,* 551 F.2d 939 (4th Cir. 1977) and *Kelly v. Cooper,* 502 F. Supp. 1371 (E.D. Va. 1980). This means that in most cases, where the plaintiff can prove that malicious prosecution has occurred, the defendant would never have accomplished the "taking" of the liberty or property interest which he initially sought due to the fact that the plaintiff prevailed in the litigation. Indeed, if a taking in the *Paul v. Davis* sense does occur, it is usually as a result of a collateral matter, not as a result of the pursuit of vexatious litigation itself. In this case, for example, Cameo's right to receive referrals from state and county agencies was taken, but that taking resulted, at least in part, because of the collateral suspension of referrals procedure, which is unique to Wisconsin law.

What the perpetrator would really have "taken," however, in such a situation, is his victim's legitimate expectation of being free from vexatious litigation, which threatened a protected interest, pursued at public expense, by a public official acting under color of state law.

Given these fundamental differences between these types of cases, neither *Paul v. Davis* nor *Wisconsin v. Constantineau* provide reliable guidance to a lower court attempting to resolve an abuse or misuse of process claim.

In the absence of any specific guidance from this Court, the circuit courts have developed a myriad of, often conflicting, standards. See, for example, *Roy v. City of Augusta,* 712 F.2d 1517 (1st Cir. 1983); *Mayer v. Wedgewood Neighborhood Coalition,* 707 F.2d 1020 (9th Cir. 1983); *Cline v. Brusett,* 661 F.2d 108 (9th Cir. 1981); *Marrero v. City of Hialeah,* 625 F.2d 499 (5th Cir. 1980); *Beker*

Phosphate Corporation v. Muirhead, 581 F.2d 1187 (5th Cir. 1978); *Jennings v. Shuman,* 567 F.2d 1213 (3rd Cir. 1977); *Wells v. Ward,* 470 F.2d 1185 (10th Cir. 1972); *Madison v. Manter,* 441 F.2d 537 (1st Cir. 1971); and, *Nesmith v. Alford,* 318 F.2d 110 (5th Cir. 1963).

In some instances, different panels of the same circuit, including the Seventh Circuit Court of Appeals, have been unable to agree on the appropriate standards governing §1983 liability. Compare, for example, the standards set forth by the court of appeals in the fifth circuit in *Marrero,* with the standard previously utilized by a different panel in *Beker Phosphate.* Compare also the standards of the circuit court in this case, *Cameo Convalescent Center v. Senn,* 738 F.2d 836 (7th Cir. 1984) with a prior holding by another panel in *Hampton v. City of Chicago,* 484 F.2d 602, 609 (7th Cir. 1973).

In *Marrero,* the fifth circuit panel held, after an exhausting analysis of *Paul,* that a loss of business occasioned by the unfavorable publicity generated by a bad faith prosecution constituted a sufficient deprivation of a protected interest to trigger a due process violation, stating that:

> "Since that interest [goodwill] is a protected property interest under Florida law, Florida may not deprive appellants of that interest without due process of law. Just as a state may not physically destroy a person's tangible property without complying with the requirements of the Fourteenth Amendment, so it may not destroy through the medium of speech a person's intangible property without the same compliance.
>
> * * * *
>
> When the government impairs those interests by leveling defamatory charges of a kind which also ines-

> capably harm an individual's protected business interests, the reputational interests rise to the level of liberty interests. . . ." 625 F.2d at pp. 515-516.

In its earlier case of *Beker Phosphate,* on the other hand, the court refused to recognize the lawful use and enjoyment of property for a business purpose as a sufficient taking of a protected interest to trigger due process considerations. That Court did, however, by way of explanation, indicate that its decision was based on the policy that "it is more important that the applicable rule of law be settled than that it be settled right" 581 F.2d at p. 1190, n. 10, quoting Justice Brandeis in his famous dissent in *Burnet v. Coronado Oil and Gas,* 285 U.S. 393 (1932). This seems to indicate that the court was not fully comfortable that its decision was the correct one. *Beker Phosphate* was one of the decisions upon which the court below primarily relied in vacating the judgment in this case.

In *Hampton,* the Court of Appeals for the Seventh Circuit specifically held that an allegation that malicious prosecution had resulted in additional legal expenses was sufficient to state a cause of action under 42 U.S.C. § 1983.

> "We are satisfied that the post-raid charges against Hanrahan, Jalovek, and the fourteen police officers are sufficient under both § 1983 and § 1985 (3).
>
> * * * *
>
> The complaints alleged that as a direct result of the conspiracy the unfounded prosecution was continued *. . . and plaintiffs incurred expenses in preparing their defense. . . . [M]atters such as the extent of injury and causal connection raise questions for the trier of fact.*
>
> * * * *

> If the alleged conspiracy did exist, . . . and if it did prolong a completely unfounded prosecution, plaintiffs are entitled to relief. . . . " 484 F.2d at 609-610. (Emphasis added)

In the instant case, on the other hand, a different panel of the Seventh Circuit refused to recognize being free from unfounded litigation by governmental officials and its accompanying expense as a protected interest. That panel found such an intrusion not to be a sufficient deprivation so as to trigger a Fourteenth Amendment due process claim.

Just a sampling of some of the criteria being applied by other circuit courts should illustrate the need for a uniform standard by this Court. In *Roy v. City of Augusta*, the Court of Appeals for the First Circuit held that a due process violation was stated where the state courts afforded due process but the defendants frustrated that process. There, the end result of litigation over a license was that the plaintiff ultimately lost his business because of the drain of the litigation and changes in economic conditions during the pendency, though the business was not "taken" by the defendants in the traditional sense.

In *Mayer v. Wedgewood Neighborhood Coalition*, the Ninth Circuit Court of Appeals denied a claim for attorney's fees against a plaintiff whose § 1983 suit was dismissed for lack of standing. The complaint did not allege any deprivation other than that the plaintiff had been required to participate in meritless litigation in order to protect its interests. The ninth circuit held that allegation to state a claim under § 1983, stating:

> "While normally protected by the First Amendment, the invocation of administrative or judicial proceed-

> ings may be tortious and actionable if employed for a purpose that is unlawful and is other than and in addition to the goal sought openly in the proceeding itself. . . . Plaintiff alleged defendants engaged in baseless opposition in various administrative and judicial proceedings to delay this project. . . . [*T*]*he parties' motivation*, and therefore the merit of plaintiff's suit, is a factual matter. . . ." 707 F.2d at p. 1023. (Emphasis added)

A similar result was reached on the merits by the Third Circuit Court of Appeals in *Jennings v. Shuman*. The court in *Jennings* concluded that:

> "An abuse of process is by definition a denial of procedural due process . . . [and] states an injury actionable under section 1983." 567 F. 2d at 1220.

In *Wells v. Ward*, on the other hand, the Tenth Circuit Court of Appeals focused not on the question of whether the interest asserted was a property or liberty interest, but rather on the question of whether the taking had been "substantial." In that case, the individual charged had actually been deprived of a liberty interest, having been arrested and denied bail. Yet that court held that the deprivation was not sufficiently "substantial" to constitute a violation of 42 U.S.C. § 1983.

In *Madison v. Manter*, the First Circuit Court of Appeals, in attempting to determine what was required in order to formulate an abuse of process claim under § 1983, focused on the question of whether the actions of the defendant were intentional and malicious. That court, in its reasoning, clearly implied that negligent or reckless conduct in bringing unfounded litigation would not run afoul of the due process clause, while intentional and malicious conduct would. The requirement of some additional "taking" was never mentioned.

This state of confusion has led at least one district judge, in attempting to discern some consistent standards to apply to a case pending in his court, to comment that:

> "Consistency has not been the mark of the treatment of § 1983 actions brought for malicious prosecution. . . ." *Henry v. City of Minneapolis*, 512 F. Supp. 293, 296 (D. Minn. 1981).

Because of this wide divergence of opinions among the circuit courts, and because under the *Marrero*, *Jennings*, and *Hampton* line of cases, liability would clearly lie in this case, this Court should exercise its discretion and grant this cross-petition for certiorari in order to resolve this important federal question. For, as Justice Brandeis earlier recognized, supra, it is important that the issue be settled.

II. THE CIRCUIT COURT DEVIATED FROM ACCEPTED PROCEDURE AND PREVIOUS RULINGS OF THIS COURT IN SETTING ASIDE THE JURY VERDICT AND INDEPENDENTLY RENDERING A FACTUAL HOLDING ON THE PROXIMATE CAUSE QUESTION.

We believe that this cross-petition for certiorari should also be granted so that the court can exercise its supervisory role in determining: (1) whether the court of appeals substantially deviated from accepted procedure and this Court's holdings in vacating the jury verdict and interjecting its own findings on a factual question; and (2) whether that court's findings are also in conflict with legal principles set forth in prior decisions of both this Court and other courts of appeal.

A. The Circuit Court Improperly Invaded The Province Of The Jury.

As the Seventh Amendment clearly indicates, jury verdicts are not to be "otherwise re-examined" except ac-

cording to the rules of the common law. In applying this principle to federal claims, this Court has consistently held that, on questions relating to proximate cause, jury verdicts are to be upheld if there is, in any view, sufficient evidence to sustain them. See, for example, *Davis v. Baltimore and Ohio Railroad Company*, 379 U.S. 671 (1965), *Harrison v. Missouri Pacific Company*, 372 U.S. 248 (1963), *Gallick v. Baltimore and Ohio Railroad Company*, 372 U.S. 108 (1963), *Arnold v. Panhandle and Santa Fe Railway Company*, 353 U.S. 360 (1957), and *Tenant v. Peoria & Pekin Union Railway Company*, 321 U.S. 29 (1944).

This doctrine was first announced by this Court in *Tenant, supra*. In that case, a widow sought compensation under the Federal Employer's Liability Act for the alleged wrongful death of her husband during the course of his employment as a member of the railroad switching crew.

The plaintiff had argued that her husband's death was caused by the negligence of the railroad crew in failing to sound the engine bell prior to moving the engine. The jury returned a verdict for the plaintiff and the district court entered judgment on that verdict. The defendants, in their appeal, had contended that the jury's finding that the decedent's death was caused by the failure to sound the bell was mere speculation, since the plaintiff had never established any causal relationship between the failure to ring the bell and the accident. The court of appeals agreed with the defendant and reversed the district court's judgment, finding that there was insufficient evidence of proximate cause to support the jury verdict. This Court reversed that finding by the circuit court, stating that:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. . . . It is the jury, not the court, which is the fact-finding body. . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." 321 U.S. at p. 35.

This Court subsequently expanded upon its holding in *Tenant* in *Gallick v. Baltimore and Ohio Railroad Company, supra.* In *Gallick,* this Court reversed a decision by a court of appeals which had set aside a jury verdict in favor of the plaintiff on the proximate cause issue. In doing so, the Court concluded that:

> "We think that the Court of Appeals improperly invaded the function and province of the jury. . . ." 372 U.S. at p. 113

In *Gallick,* a railroad spotting crew foreman had brought suit against the railroad under the Federal Employer's Liability Act alleging that he was bitten by an insect while working on the railroad right-of-way. He contended that that insect bite resulted in a wound which subsequently became infected, that the infection failed to respond to any medical treatment, that it worsened progressively, and that ultimately the condition necessitated the amputation of both of his legs.

The court of appeals in *Gallick,* in reversing the jury verdict originally returned for the plaintiff, found that there was insufficient evidence to find that the defendant's negligence was the proximate cause of the insect bite, and that the nature and degree of injuries sustained by the plaintiff were beyond the realm of reasonable probability or foreseeability by the defendant. That court had relied

heavily upon certain findings made by the jury in its special verdict to establish inconsistency between portions of the verdict. That inconsistency was then used to justify an independent examination and factual determination by the court of appeals.

The jury had found, as part of its special verdict, that there was no reason for the defendant to anticipate that the action complained of would or might probably result in a mishap or injury. The jury also negatively answered the question of whether the harm sustained by the plaintiff was within the realm of reasonable probability or foreseeability of the defendant.

Thus, the issue presented to this Court in *Gallick* was whether jury findings, which appeared in certain particulars to be inconsistent with the overall finding of liability, were properly used by an appellate court to impeach the overall verdict. In answering that question in the negative, this Court stated that:

> "[I]t is the duty of the courts to attempt to harmonize the answers, if it is possible after a fair reading of them." 372 U.S. at p. 119.

The circuit court in this case did the same thing as the circuit court in *Gallick*. In setting aside the verdicts on the abuse of process and malicious prosecution counts, the court of appeals relied on the jury's answer to a special verdict question on another count in the complaint. That answer indicated that none of the defendants were "personally and directly responsible" for Cameo's placement on the SOR list, "*and* acted with intentional or reckless disregard" of Cameo's appeal rights. However, the using of this ambiguous finding, to impeach two clear

findings of liability on other counts, runs afoul of the standards set forth in *Gallick, supra.*

It is true, of course, that the jury in this case did not specifically find, because it was never specifically asked to find, that the actions of Senn were a proximate cause of Cameo's placement on the SOR list. The jury did find, however, after being properly instructed on the requirement that there needed to have been a "deprivation" in order to violate due process, that Darla Senn was liable on two separate theories.

We must keep in mind that the jury's answers to the verdict questions on malicious prosecution and abuse of process were not rendered in a vacuum. They were rendered only after the jury had been instructed on the applicable law by the trial court. Thus, in construing the jury's answers to the special verdict questions, we must construe those answers in light of the instructions which the jury had been given.

Prior to retiring to deliberate its verdict, the jury was specifically instructed by the court that Cameo's claims were based upon an alleged deprivation of a protected interest under the due process clause of the Fourteenth Amendment. (Cross-Pet. App. 13A-14A) The trial court further instructed the jury that § 1983 provides only that an inhabitant may seek redress by way of damages for a "deprivation of any rights, privileges or immunities," and that "the Fourteenth Amendment to the Constitution provides . . . nor shall any State *deprive* any person *of life, liberty or property* without due process of law; . . . ." (Cross-Pet. App. 13A-14A) (Emphasis added). Thus, the jury was aware, because it had been properly instructed, that the claims of the plaintiff were predicated

upon the existence of a deprivation of a protected Fourteenth Amendment liberty or property interest.

Assuming, as we must, that the jury rendered its verdict in compliance with the instructions which it had been given, it logically follows that the jury, in finding that Senn had committed the proscribed acts, did find the requisite deprivation to have occurred. And, once that jury finding has been made, it is insulated from attack on review as long as there is any evidence to sustain it, *Gallick, supra.*

This view of the jury verdict is further buttressed by the district court's ruling, shortly after that verdict had been rendered, on the cross-respondent's motion for judgment notwithstanding the verdict and to amend the judgment to one of no liability. In denying that motion, the district court analyzed the arguments of Senn and, in rejecting them, based its decision on two alternative grounds. First, that court concluded that malicious prosecution and abuse of process themselves constituted violations of due process, citing, *Jennings v. Shuman, supra.* The court also, however, based its holding on the alternative and independent ground that the verdict was supported by evidence that the acts of Senn did subject the plaintiff to a deprivation of constitutional magnitude, citing *Hampton v. Hanrahan,* 600 F.2d 600 (7th Cir. 1979). (Cross-Pet. App. 1A-4A)

That court reasoned as follows:

> "The nursing home violation citations written by her *started a process which could have resulted in denial of* the nursing home's right to receive patients, *a property right* by virtue of various provisions of state law. There was also evidence that she involved herself in the hearing process although she was not

personally or directly responsible for a number of subsequent events *that followed naturally from the initial issuance of citations.*" (Cross-Pet. App. 2A) (Emphasis added)

Thus, since it is reasonable to conclude that the jury did find the requisite deprivation, and there is adequate evidence in the record to support that finding under the standards set forth in *Gallick v. Baltimore & Ohio Railway* and *Tenant v. Peoria and Pekin Railway Company, supra,* this Court should grant certiorari in order to exercise its supervisory jurisdiction to correct the error of the circuit court in setting aside that verdict.

B. The Legal Standards Applied By The Circuit Court In Finding No Proximate Cause Are In Conflict With Prior Rulings Of This Court And Of Other Applicable Courts of Appeal.

The circuit court based its decision, setting aside the jury verdict against Senn and in favor of the cross-petitioner, on the grounds that "the nexus between the infringement upon Cameo's constitutionally protected rights and Darla Senn's issuance of the NOV's is simply too attentuated to permit this court to hold that Senn subjected, or caused Cameo to be subjected, to the deprivation of due process." (Pet. App. at p. 46) In reaching this conclusion, the court relied upon the fact that a number of other events followed Senn's issuance of the NOV's which may have contributed to Cameo's placement on the SOR list. The court emphasized that between the issuance of the NOV's and Cameo's placement on the SOR list, there were two further verification visits of Cameo, meetings held among WDHSS officials concerning Cameo's NOV's, and the "mishandling" of Cameo's timely appeal. In short, the circuit court relied upon intervening acts by

other defendants, which may have contributed to the ultimate injury which Cameo suffered, as relieving Senn of any legal responsibility for Cameo's placement on the SOR list.

This Court has held, however, that intervening acts of other defendants do not relieve an original actor from liability, so long as the original acts are still operative and contribute to the resulting injury. It stated this rule as follows:

> "The rule is settled by inumerable authorities that if injury be caused by the concurring negligence of the defendant and a third person, the defendant is liable to the same extent as though it had been caused by his negligence alone." *Miller v. Union Pacific Railroad Company,* 290 U.S. 227, 236 (1933).

This ruling is consistent not only with the prevailing decisions of the circuit courts of appeal, but also with the applicable state law of Wisconsin. See, for example, *Elliott v. Michael James, Inc.,* 559 F.2d 759, 764 (D.C. Cir. 1977), *Hicks v. United States,* 511 F.2d 407 (D.C. Cir. 1975); *William G. Roe and Company v. Armour and Company,* 414 F.2d 862, 870 (5th Cir. 1969); *Phillips Petroleum Company v. Hardee,* 189 F.2d 205 (5th Cir. 1951); *Heims v. Hanke,* 5 Wis. 2d 465, 471, 93 N.W.2d 455, 459 (1958); and, *Bolick v. Gallagher,* 268 Wis. 421, 427, 67 N.W.2d 860, 863 (1954).

In *Miller,* this Court, after noting that under the federal rules the burden of proving contributory negligence as an intervening cause is on the defendant, went on to examine, and concur with, a previous decision by a circuit court in *Memphis Consolidated Gas & Electric Company v. Creighton,* 183 F. 552, a gas explosion case. In *Creighton,* the gas company had been shown to be negligent in allowing leaking gas into a building. There was, however, a more

direct and immediate negligence on the part of another individual. That person had lighted a match in order to determine the source of the smell of gas. In holding the gas company liable, despite the intervening negligence of the other individual, the court stated that:

> "The truth of the matter is that the causes of the injury were concurrent. The accumulation of the gas was one; the lighted match was the other. The effect of the former had not ceased, but cooperated with that of the other in effecting the injury. In such case an inquiry about the proximate cause is not pertinent, for both are liable." 290 U.S. at pp. 236-237 quoting *Memphis Consolidated, supra.*

The instant case is on all fours with the rationale set forth in *Miller*. There were two primary causes for Cameo's placement on the suspension of referrals list. The first, of course, was the issuance of the NOV's by Senn in the first instance. It was, after all, the issuance of these unwarranted NOV's which set in motion the enforcement machinery which ultimately led to Cameo's placement on the SOR list.

The second primary operative cause was the failure to provide Cameo with the predeprivation hearing mandated by the due process clause. Neither of those causes, however, could have been independently responsible for Cameo's placement on the list. The two causes therefore acted together in order to work the one, indivisible, injury which occurred.

Therefore, just as in the *Memphis Consolidated Gas & Electric* case, both wrongs are the proximate cause of Cameo's injury. It follows that, under *Miller,* either or both of the responsible parties are liable for the injuries

which occurred and the judgment against Senn should not have been set aside.

For, as the Fifth Circuit Court of Appeals noted in *Phillips Petroleum Company, supra,* "[Where] the independent tortious acts of two or more persons supplement one another and concur in contributing to and producing a single indivisible injury, such persons have in legal contemplation been regarded as joint-feasors, notwithstanding the absence of concerted action." 189 F.2d at p. 212.

In *Roe, supra,* the circuit court found that "[j]oint and several liability is established, however, where an act, subsequent in time, concurs with a prior cause to produce 'inseparable' damages." 414 F.2d at p. 870.

Nor would the result change if this Court were to apply, as one circuit court applied in *McCulloch v. Glasgow,* 620 F.2d 47 (5th Cir. 1980), state law in determining the issue of proximate cause. *McCulloch* was a civil rights case under § 1983, and that court applied the state law on the proximate cause question.

The existing proximate cause rule in Wisconsin is no different than that set forth in *Miller* and *Roe* above. It provides that:

> "It is an elementary principle that where independent torts result in separate injuries, each tort-feasor is separately liable for his own torts. . . However, it is also an established principle that where independent torts concur to inflict a single injury, each tortfeasor is liable for the entire damage. 86 C.J.S. Torts, p. 951, § 35." *Bolick v. Gallagher, supra,* 268 Wis. at p. 427.

See also, *Heims v. Hanke, supra.*

Thus, it follows that whether the applicable law on proximate cause is the federal law or the state law, the circuit court's decision was erroneous. It conflicts with both.

This Court should therefore grant the cross-petition for certiorari in order to exercise its supervisory power to correct this error of the circuit court in detemining the rights of the parties under the Federal Civil Rights Act.

CONCLUSION

For the above-stated reasons, cross-petitioner contends that its cross-petition for certiorari on the issues presented should be granted and the matter should be set for briefing and argument on the merits.

Dated this 26th day of October, 1984.

Respectfully submitted,

ROBERT M. HESSLINK, JR.
Attorney for Cross-Petitioner

121 South Pinckney Street
P.O. Box 2509
Madison, WI 53701
(608) 255-8891

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

79-C-570

CAMEO CONVALESCENT CENTER, INC., et al.,

Plaintiffs,

v.

DONALD E. PERCY, et al.,

Defendants.

MEMORANDUM AND ORDER

The matter, having come on for trial before a jury which returned a verdict of liability against defendant Darla Senn on September 22, 1982, and a verdict for damages against Darla Senn for $65,000 in compensatory damages and $10,000 in punitive damages on October 5, 1982, is now before the Court for defendant Darla Senn's motions after verdict. The motions are for judgment notwithstanding the verdict pursuant to Rule 50(b), and for amendment of the judgment pursuant to Rule 59(e). The motions are denied.

MEMORANDUM

I. AMENDMENT OF THE JUDGMENT

Defendant's motion for amendment of the judgment is clearly based on the proposition that, as a matter of law, malicious prosecution and abuse of process are nothing more than state common law claims and cannot substan-

tiate plaintiff's claim under 42 U.S.C. § 1983. According to this motion, the fact that the jury answered in the negative when asked whether defendant's actions were motivated by retaliation for plaintiff's First Amendment exercise, is evidence that the jury's other findings that plaintiff's rights had been violated were not supported by the evidence. These arguments must fail.

The questions which the jury answered in finding liability against defendant Senn, which were supported by sufficient evidence, established that she had maliciously prosecuted plaintiff for nursing home violations which were not based on probable cause, and that she had abused the process concerning the procedure by which plaintiff could vindicate itself. The nursing home violation citations written by her started a process which could have resulted in denial of the nursing home's right to receive patients, a property right by virtue of various provisions of state law. There was also evidence that she involved herself in the hearing process although she was not personally and directly responsible for a number of subsequent events that followed naturally from the initial issuance of citations.

As the Court has previously stated, an abuse of process is, by definition, a denial of due process. *Jennings v. Shuman,* 567 F.2d 1213 (3rd Cir. 1977). The Court is further persuaded that its prior ruling on essentially the same point was correct by the following language from *Hampton v. Hanrahan,* 600 F.2d 600 (7th Cir. 1979):

> An action for malicious prosecution may be brought under Section 1983, if, acting under color of state law, the defendant has subjected the plaintiff to a deprivation of a constitutional magnitude.

Id. at 630. The malicious prosecution did subject plaintiff to such a deprivation. The fact that the actions of defendant Senn were not motivated by plaintiff's exercise of the First Amendment is utterly inconsequential.

II. JUDGMENT NOTWITHSTANDING THE VERDICT

Defendant Senn's motion for judgment notwithstanding the verdict is based on the fact that she is garbed with prosecutorial immunity by virtue of having the authority, under § 50.04(4), to issue citations to nursing homes. This Court allowed exactly this question to go to the jury with significant misgivings. The Court saw little or no relationship to the duties of a prosecutor as set forth in *Butz v. Economou,* 438 U.S. 478 (1978), and the cases which preceded it, and the duties of defendant Senn. The jury apparently saw no relationship either as they answered the question as to whether she was subject to prosecutorial immunity in the negative.

The Court believed then, and believes now, that the actions which resulted in the finding of her liability were acts analogous to those of a police officer in making an arrest. Police officers have no such immunity and neither does defendant Senn.

Accordingly,

ORDER

IT IS ORDERED that defendant's motion for amendment of the judgment is DENIED.

IT IS FURTHER ORDERED that defendant's motion for judgment notwithstanding the verdict is DENIED.

Entered this 3rd day of December, 1982.

BY THE COURT:

/s/ JOHN C. SHABAZ
District Judge

———o———

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 79-C-570

CAMEO CONVALESCENT CENTER, INC., et al.,

Plaintiffs,

v.

DONALD E. PERCY, et al.,

Defendants.

ANSWER TO SECOND AMENDED COMPLAINT

---

* * * *

FIFTH DEFENSE

56. As to all matters relevant to the pleadings contained in plaintiff's complaint, defendants Siegel and Van De Grift, as attorneys connected with the prosecution of administrative proceedings enjoy prosecutorial immunity from liability.

* * * *

Dated this 1st day of July, 1982.

BRONSON C. LA FOLLETTE
Attorney General

/s/ STEVEN C. UNDERWOOD
/s/ CHARLES D. HOORNSTRA

———o———

CORRESPONDENCE/MEMORANDUM

STATE OF WISCONSIN

Date: June 5, 1979

To: Thomas G. Van de Grift

From: Donald P. Johns
Assistant Attorney General

Subject: *Department of Health & Social Services v. Cameo Convalescent Center, Inc., and Dragomir Kresovic*

• • • •

By way of background for informational purposes for those recipients of this memo who are not totally aware of the nature of the assignment, I was asked last month to prepare, serve and file pleadings under sec. 885.12, Stats., and schedule a hearing designed to compel the home to honor the three subpoenas previously issued by Examiner Tom Patterson in the name of the home rather than in the name of one of the home's officers or the custodian of the records. The reasons for taking this action rather than re-serving the subpoenas in the name of an individual were (1) that there is authority for the proposition that a corporate entity must obey a subpoena duces tecum if served on one of its officers and (2) that the home has continually failed to cooperate in the administrative hearing before the department.

• • • •

Hesslink began by reciting numerous jurisdictional concerns which he desired to state on the record. He then indicated a desire to take Siegel's testimony and that of his two clients and, in response to a question from the judge, indicated that this testimony would take probably at least an hour or an hour and a half. Although [Judge] Jones made no oral expression, I noted a hint of displeasure in his facial expression. During this conference he asked me why the subpoenas were not re-served instead of taking this approach. In truthfulness, I had to inform him that the possibility of re-serving the subpoenas was dis-

cussed and would serve the purpose, in part, but that this action was necessary because of the home's lack of cooperation in other respects as well as on this issue.

* * * *

Later that afternoon I had occasion to discuss the matter informally with Judge Jones off the record. By way of background, Judge Jones and I have been close personal friends since the late 1950's, and we not only roomed together for a year or so but he was the best man at my wedding.

* * * *

[I]t was his feeling that he could not grant any practical relief of assistance to your department or by way of educating, admonishing or penalizing the respondents. Notwithstanding our repeated discussion relative to the home's continued lack of cooperation during these proceedings, he felt that they got the picture that the department meant business and that they incurred a sufficient "penalty" by having to attend the hearing.

(Exhibit 169)

* * * *

———o———

CORRESPONDENCE/MEMORANDUM

STATE OF WISCONSIN

Date: June 13, 1979

To: Thomas Vandegrift, Attorney
Enforcement Section

From: Via Fran Richards, HFS-RN, Supervisor
District 2, Milwaukee

Darla Senn, HFS-RN
District 2, Milwaukee

I am writing this to recap recent happenings/conversations and phone calls with you for the record. On June 6, 1979, we met briefly in your office to discuss the continuance of Cameo administrative hearing to which you

have been newly assigned as the attorney. At that time you stated to me that you intended to use a "new plan of approach" which you explained was to "ask to meet with the Cameo attorney, Mr. Hesslink, and the Cameo owners". This you planned to do on June 11, 1978 [sic], the day the hearing was scheduled to resume. The purpose you said was to tell them the State was prepared to "match dollar for dollar on hearing/enforcement" but "they would have to correct the violations anyway" and that this approach which you described as creating a "wedge" was indicated as it is your belief the Cameo attorney is "milking" the Cameo owners, the Kresovics.

(Exhibit 176)

* * * *

———o———

[SUMMARY OF NOTICES OF VIOLATION]

Cameo Convalescent Center 1979 [sic] Survey

The following NOVs have severe problems either as a result of poor methodology of investigation, incorrect citations or lack of documentation.

NOV#	
111805(B)	Cited as 32.08(3)c, 32.08(6), 32.08(6)c This NOV based upon failure of home to meet "Master Staffing Plan." They do meet minimum staffing requirement.
111806(B)	Cited as 32.08(F)(g), 32.10(1) This NOV is based upon the same facts relied upon in NOV 111805
111810(B)	Cited as 32.11(1)d, 32.11(1), 32.11(1)b The evidence used to support this NOV ignored the fact that the treatment, i.e., Foley Catheter, was ordered by the doctor. The evidenced [sic] indicated that there may be a problem in this area, but alone does not substantiate a violation, i.e., one of every twelve patients have decubiti.

111823(C) 32.12(2)(a)
This NOV stated that the facility lacked a sufficient supply of restraints. The surveyor came to this conclusion based on the fact that she saw bed linen used as restraints. The V.V. showed that there was a sufficient supply of commercial restraints-just not used.

See 32.055(1)k

101082(C) Cited as 32.23(1)
The regulation does not set down time requirements for this type of inservice. The facility had completed one less than 1½ years previous.

101083(C) Cited as 32.055(1)k
This NOV duplicated 111809

111808(C) 32.10(3)(a)
This NOV needs documentation. It also is incorrectly cited.

111813(B) 32.20(5)(c)
This NOV was incorrectly cited.
The examples do not fit the code section.

The following NOVs are questionable as far as documentation and methodology.

111817(C) 32.20(6)(e)(2) (very weak)
The surveyor asked someone else to read the thermometer. Basic hearsay problem - extremely poor investigation.

111811(B) 32.11(1)c 32.11(1)f
This NOV deals with bedrest of patients without doctor's orders. Although there is documentation here, the surveyor did not see if there were any other factors that would have explained the situation.

111812(B) 32.11(2) 32.11(2)d
The former is too general a cite.

The allegation is that all 30 Foley Catheter patients are involved. There has to be documentation of this.

111824(C) 32.19(1) (Weak)
Incorrect citation; it should have been under 32.25(3)(g)

111807(C) 32.10(2)a 32.10(4)(b) (Weak) 32.10(2)c
Of the examples used a portion were contained in another manual, one is ridiculous and one is of questionable significance.

111804(C) 32.08(3)o (Weak)
This NOV deals with monthly nursing meetings. The facility says that it has information that will substantiate its position. The surveyor should have investigated further.

111728(C) 32.05(4)1
A technical violation, but arguably it is correct.

111807(C) 32.07(2)(c)2
The home states that the information was available but not in its correct place. This needed further investigation.

111829(C) 32.25(3)a (Weak)
Minister or priest's phone number. This NOV is nitpicking. The home had the parish number listed. The surveyor did not follow up by asking the residents if this was sufficient.

111816

111827(C) 32.20(6)h
Miscited, but one of them should be used.

111815(C) 32.20(4)(c) - disregard 32.20(7)b
This NOV needs further substantiation in the form of drug administration sheets.

111825 F268
This violation will depend upon review of pharmaceutical records. In this case the

three "irregularities" were documented in the pharmacist's private notes.

111819(C) 32.20(9)(a)i (Weak)
This NOV has severe evidentiary problems as a result of the investigation. The surveyor called up the pharmacy, talked with an unidentified person and received the information upon which this NOV was based.

111820(C) 32.20(9)(a)2 - better cite
32.20(3)h (Weak)
As with 111819 this information gained through a telephone conversation with unidentified party.

NOVs possibly to be withdrawn.

111805 Cite 32.08(6)
Darla's response gave no examples of lack of basic care. She could not cite examples of lack of patient care.

111806 The sections cited are not supported by the body of the NOV.

111825 The information request was not produced. It is my opinion that the information was not here. This is a deficiency on the part of the pharmacist but not the facility.

111824 incorrect citation
cited under H32.19 but should be under H32.25(3)(g)

111817 The surveyor based the violation on the statements of another party. Basic hearsay problem.

111827 Duplicated 111816

111820 or 111819

Both are based upon hearsay.
The latter is to be dropped

(Exhibit 315)

———o———

[Date:] November 13, 1979

[To:] Chuck Fiss
Via Peg Smelser
Lou Remily

[From:] Tom Van de Grift
Stephen Youngerman

[Subject:] 1978 Cameo Survey

The hearing for this survey will be held at the end of this month, and we have made a final review of the NOVs. Throughout August and September we presented a total of 15 NOVs that were legally insufficient or without a factual basis that were used in negotiations. At hearing we propose to withdraw the following NOVs:

111802, 111808, 111810, 111814, 111816, 111819, 111820, 111823, 111824, 111829, 101082, 101083, and the federal cite for 111729, for a total of 11.

Three of these NOVs have not been presented to you prior to this time, they are NOVs #111814, 111816, and 111729. We are asking that these be withdrawn because of incorrect citations and incomplete documentation.

We expect to complete the nurse's testimony in these two days. This constitutes the major portion of our case, so we hope to have the hearing wrapped up as soon as possible after that time.

TVG:SY:jb (Exhibit 217)

———o———

December 14, 1979

Mr. Dragomir Kresovic
Administrator
Cameo Convalescent Center
5790 South 27th Street
Milwaukee, Wisconsin 53221

Re: 1978 Survey

Dear Mr. Kresovic:

On November 19, 1979, our attorney indicated at the administrative hearing that the Bureau of Quality Compliance

was withdrawing a number of NOV's. The Bureau of Quality Compliance does not consider the factual matters presented in the following NOV's to have been indicative of a violation of H32 Wisconsin Administrative Code, Chapter 50, Wis. Stats. or the applicable Federal Regulations.

This letter is to confirm that these NOV's have been withdrawn:

111802, 111808, 111814, 111819, 111820, 111823, 111824, 111829, 101082, 101083. 111816 was consolidated with another NOV.

If there are any questions, please contact Mr. Stephen Youngerman at (608) 266-0087.

Sincerely,

Peggy Ann Smelser
Acting Bureau Director
Bureau of Quality Compiance
cc: S. Youngerman
J. Fryback
J. Kervin

(Exhibit 233)

———o———

CORRESPONDENCE/MEMORANDUM

STATE OF WISCONSIN

Date: December 28, 1979 File Ref: Confidential

To: File

From: Tom Van de Grift
Stephen Youngerman

Subject: Cameo 1978 Survey Hearing

An analysis has been done on those NOVs still in issue at the hearing. There are 20 NOVs, one of which is strong, seven are okay, two are less than okay, six are weak and four are extremely weak.

The major problem we have is the surveyor, specifically, the lack of information she has previously provided the Department's attorneys. This has left us open to an attack on the factual basis of the NOVs.

TVG:SY:jb

cc: Peg Smelser
Judy Fryback

(Exhibit 237)

THE COURT: Thank you, counsel. Members of the jury, now that you've heard the evidence and the closing arguments, it becomes my duty to give you the instructions of the Court as to the law which is applicable to this case.

* * * *

The plaintiffs' claim. The plaintiff alleges in this case that it was harassed in retaliation for its exercise of its First Amendment rights to free speech and to petition the government for a redress of grievances and that it was deprived of property without due process of law, contrary to the rights guaranteed by the Fourteenth Amendment.

* * * *

Statute. There is a Statute 1983 of Title 42 of the United States Code Annotated. It provides that any inhabitant of this federal district may seek redress in this court, by way of damages, against any person or persons who, under color of any law, statute, ordinance or regulation, or custom, knowingly subject such inhabitant to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States.

Now the purpose of the Civil Rights Act. The statute, we call it 1983. The statute just outlined to you comprises one of the Civil Rights Acts enacted by Congress under the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment to the Consti-

tution provides: no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Malicious prosecution . . .

* * * *

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

* * * *